**UNPUBLISHED ORDER**
**NOT TO BE CITED PER CIRCUIT RULE 53**

# UNITED STATES COURT OF APPEALS

**FOR THE SEVENTH CIRCUIT**
**Chicago, Illinois 60604**

---

## No. 98-2119

---

ROBERT W. AYLWARD, - - - *Plaintiff-Appellant,*

*v.*

CLAIRE W. BAMBERG, - - - *Defendant-Appellee.*

---

*Appeal from the United States District Court*
*for the Southern District of Indiana,*
*Indianapolis Division*
*Larry J. McKinney, Judge*

---

**ORDER**—Argued December 7, 1998
Decided July 6, 1999

BEFORE: HON. JOHN L. COFFEY, Circuit Judge, HON. JOEL M. FLAUM, Circuit Judge, HON. TERENCE T. EVANS, Circuit Judge.

On August 14, 1992, Claire Bamberg ("Bamberg") reported to military authorities at Fort Benning, Georgia she suspected Robert Aylward's ("Aylward") children were being sexually abused. Almost two years later, Aylward, an Army Sergeant at Fort Benning, filed a complaint in federal court against Bamberg claiming the telephone call amounted to defamation.[1] On October 24, 1995, Bamberg filed a motion to seal Certain documents she wanted to

---

[1] On September 29, 1994, Bamberg filed a counterclaim for abuse of process. As of the date of this appeal, that claim was still pending in the district court.

submit in support of her motion for partial Summary judgment. The next day, the district court granted the motion, and on October 30, 1995, Aylward filed an objection to the motion to seal. The two parties then filed a barrage of motions attempting to strike numerous portions of the others' motions. The district court denied each of these and, on June 28, 1996, granted Bamberg summary judgment on the defamation claim.

Aylward now appeals, arguing that: I) if Bamberg had a duty to report the alleged abuse, she should have reported it to the authorities in Indiana, not Fort Benning; 2) the district court abused its discretion by sealing certain documents from Aylward; and 3) the district court committed error in granting Bamberg summary judgment because there existed genuine issues of material fact. We affirm.

Bamberg is a pastoral counselor employed at the Mount Gilead Counseling Center in Indianapolis, Indiana.[2] In September 1991, Aylward's former spouse, Julie Wisley ("Wisley"), sought counseling from Bamberg.[3] As a result of these sessions, Bamberg became convinced that Wisley had been subjected to various forms of abuse during the course of her marriage to Aylward.

In February 1992, Bamberg also began to provide counseling for Aylward's and Wisley's children: Rachel, who was age 9 at the time; Benjamin, who was also 9; Faythe, who was 7; and Sara, who was 2. After five months of counseling, Bamberg prepared a Case Summary detailing her findings regarding the children.

With regard to Rachel, the report noted that a medical exam at the Wishard Hospital[4] revealed an irregular shape

---

[2] Bamberg holds herself out to be a psychotherapist, even though she is not certified with any state in that capacity.

[3] At all times relevant to this appeal, Aylward and Wisley were in the middle of a "bitter" divorce.

[4] The record is silent as to when the exams at Wishard were conducted.

to the hymen and apparent scar tissue both vaginally and rectally. When Bamberg combined this information with her own observations, she concluded that it was "highly probable" that Rachel had been a victim of sexual abuse.

With regard to Benjamin, the Wishard report also noted rectal scarring. There were also other indicators of abuse, including Benjamin being unusually thin, angry, abusive in a way different from sibling rivalry, and vocal about not wanting to spend time with his father. Bamberg concluded that it was also likely that Benjamin was being abused.

Faythe was slender, withdrawn, "clingy," and agitated. Additionally, she presented the most prevalent clinical symptoms of abuse of any of the four children. The examining physician at Wishard, although stating that the findings should not be used in isolation, concluded that sexual abuse was probable. The Wishard report noted oozing, thickened, attenuated hymenal tissue; labial separation; and an anal tear and fissure. Understandably, Bamberg was concerned for Faythe's well-being.

With regard to Sara, Bamberg initially believed her to be a well adjusted two-year-old. Bamberg's impression changed, however, after Sara's first week-long visit with her father. Bamberg's report noted that Wisley had informed her that Sara would scratch and dig at herself following a visit to her father's residence. While Bamberg recognized that there were innocent explanations for Sara's behavior, she believed, given her assessment of the overall family situation, that the more likely explanation was abuse.

Over the next 10 weeks, Bamberg noted a steady degeneration in the children's behavior. After speaking with Marilyn Hartman ("Hartman"), who represented Wisley in her divorce and custody proceedings, about her concerns regarding possible abuse, Bamberg was informed (by Hartman) that she had a legal obligation to report her suspicions to the proper authorities at Fort Benning. She did so, telephoning Sergeant Frederick Robinson of the United States Army.

After confirming that Sergeant Robinson was the proper person to report abuse to, Bamberg informed him that she was aware of a situation involving four children whom she believed were the victims of abuse.[5] She then identified Aylward and Wisley as the parents of the four children. At no time did she state that it was Aylward who was abusing the children.

In Aylward's federal suit, he claimed that the telephone call Bamberg made to the military police constituted defamation. Barnberg replied that Indiana law required her to make the report and provided her with a cloak of immunity. Given the obviously sensitive nature of the proceedings and concerned about her potential liability for illegally revealing information obtained during the course of her counseling sessions with Wisley and the children, Bamberg filed for permission to submit her motion for summary judgment and brief in support under seal. The district court granted the motion to seal the documents but allowed Aylward's counsel to view them.[6] Aylward objected, claiming that it was "unfair" and that the seal prevented him from meaningfully participating in the prosecution and defense of his case.

The district court disagreed with Aylward and denied his objection to the sealed documents. After carefully reviewing the materials set forth in Bamberg's motion for summary judgement and Aylward's response, the court granted summary judgment to Bamberg on the defamation claim. Aylward appeals.

---

[5] There is some dispute as to whether Bamberg identified herself as a member of the organization known as the Alliance for the Rights of Children. Robinson's notes of the telephone call indicate that Bamberg did so— a point which Bamberg denies. The resolution of this factual dispute is not, however, necessary to resolve this appeal.

[6] Aylward was prevented from viewing the documents and Aylward's counsel was prevented from discussing them with his client.

On appeal, Aylward argues that: 1) if Bamberg had a duty to report the alleged abuse, she was required to report it to the authorities in Indiana, not Fort Benning; 2) the district court abused its discretion by sealing certain evidence from Aylward; and 3) the district court erroneously granted Bamberg summary judgment because there existed genuine issues of material fact.

In order to protect children, Indiana, like other states, has adopted measures seeking to uncover instances of child abuse.[7] The compelling interest of the state reflects characteristics special to abused children: they are often unaware of their own abuse or injury; they may be unable to report abuse because of their age or fear of retaliation; frequently the effects of abuse may be difficult for third parties to detect; abused children can and often do carry physical and emotional scars for a lifetime; and of course the state bears a special responsibility to protect children who have limited abilities to choose their own course of action. See *generally* Mary M. Huryley, *Duties in Conflict: Must Psychotherapists Report Child Abuse Inflicted by Clients and Confided in Therapy?*. 22 San Diego L. Rev. 645

---

[7] Some examples from other states include: Ariz. Rev. Stat. § 13-3620 (1998); Ark. Code Ann. § 12-12-504 (Michie 1998); Cal. Penal Code §§ 11166, 11172 (West 1998); Conn. Gen. Stat. Ann § 17a-101 (West 1998); Fla. Stat. Ann. §§ 415.502 to 415.514 (West 1998); Ga. Code Ann. § 19-7-5 (1998); Idaho Code § 16-1619(1998); 325 Ill. Comp. Stat. Ann. 5/4 (West 1998); Iowa Code Ann. §§ 232.68 to 232.77 (West 1998); Ky. Rev. Stat. Ann. §§ 620.030, 620.040, 620.050 (Banks-Baldwin 1998); La. Rev. Stat. Ann § 14:403 (West 1998); Mass. Gen. Laws Ann. ch. 119, § 51A (West 1998); Mich. Comp. Laws Ann. § 722.633 *et seq.* (West 1998); Minn. Stat. Ann. § 626.556 (West 1998); Mo. Ann. Stat. § 210.115 (West 1998); N.J. Stat. Ann. § 9:6-8.8 et seq. (West 1998); Okl. Stat. Ann. tit. 10, § 7103 (West 1998); Tenn. Code Ann. § 37-1-401 *et seq.* (1998); Wash Rev. Code Ann. § 26.44.030 (West 1998); W. Va. Code § 49-6A-1 et seq. (1998); Wis. Stat. Ann § 48 981 (West 1998).

(1985); Frederica K. Lombard, *et al., Identifying the Abused Child: A Study of Reporting Practices of Teachers*, 63 U. Det. Mercy L. Rev. 657 (1 986); Mary Harter Mitchell, *Must Clergy Tell? Child Abuse Reporting Requirements Versus the Clergy Privilege and Free Exercise of Religion*, 71 Minn. L. Rev. 723 (1987).

In Indiana, "an individual who has reason to believe that a child is a victim of child abuse or neglect *shall* make a report." Ind. Code § 31-33-5-1 (1998) (emphasis added). This duty to report is absolute and applies to all persons. *See Devore* v. *State* 658 N.E.2d 657, 658 (Ind. Ct. App. 1995); *Daymude* v. *State* 540 N.E.2d 1263, 1265 (Ind. Ct. App. 1989). Accordingly, Bamberg, a resident of the state of Indiana, had an affirmative duty to report her suspicions to the proper authorities if she had a "reason to believe" that the children were being abused.

Reason to believe is defined as "evidence that, if presented to individuals of similar background and training, would cause the individuals to believe that a child was abused or neglected." Ind. Code § 31-9-2-101(1998). Moreover, Indiana law provides immunity to individuals who report child abuse or neglect. According to the Indiana Code:

> Except as provided in section 2 [IC § 31-33-6-2) of this chapter, a person, other than a person accused of child abuse or neglect, who:
>
> (1) *makes or causes to be made a report of a child who may be a victim of child abuse or neglect;*
>
> (2) is a health care provider and detains a child for purposes of causing photographs, x-rays, or a physical medical examination to be made under IC 31-33-10;
>
> (3) makes any other report of a child who may be a victim of child abuse and neglect; or
>
> (4) participates in any judicial proceeding or other proceeding:
>
> (A) resulting from a report that a child may be a victim of child abuse or neglect; or
>
> (B) relating to the subject matter of the report;

> is immune from any civil or criminal liability that might otherwise be imposed because of such actions.

*Id.* at § 31-33-6-1 (emphasis added). The exception in the statute provides that "[i)mmunity does not attach for a person who has acted maliciously or in bad faith." *Id.* at § 31-33-6-2. However, "[a] person making a report that a child may be a victim of child abuse or neglect or assisting in any requirement of this article is *presumed* to have acted in *good faith." Id.* at § 3 1-33-6-3 (emphasis added). Thus, according to these statutes, Bamberg was required to report her suspicions to the proper authorities if she had "reason to believe" the children were suffering from abuse, and she is immune from civil liability for her action unless she acted "maliciously or in bad faith."

Aylward's first contention on appeal is that Bamberg acted in bad faith because she reported the suspected abuse to the authorities at Fort Benning instead of the authorities in Monroe County, Indiana. It is, of course, "axiomatic that an issue not first presented to the district court may not be raised before the appellate court as a ground for reversal." *Huntzinger* v. *Hastings Mut. Ins. Co.*, 143 F.3d 302, 307 (7th Cir. 1998) (internal quotes omitted). Because Aylward failed to present this claim to the district court, it is waived. *See id.*

In the district court, Bamberg argued that the sensitive nature of the proceedings as well as her desire to ensure that she protected herself from liability for improperly divulging information obtained during the course of her counseling Wisley justified sealing her motion for summary judgment.[8] Aylward responded, as he does in this

---

[8] Although we understand the sensitive nature of these proceedings, Bamberg's concern with liability may have been misplaced. Her lack of any official certification as a psychotherapist makes this court suspicious of any claim to the psychotherapist-patient relationship as enumerated in *Jaffee* v. *Redmond*, 518 U.S. 1, 9-11 (1996). And although Bamberg is a member of the clergy, the record does not support the conclusion that Wisley approached her with the necessary penitence for the clergy-penitent privilege to apply. *See United States* v. *Dube*, 820 F.2d 886, 889 (7th Cir. 1987). The resolution of this issue, however, is not necessary for the disposition of this appeal.

court, that even though his counsel was permitted to view the documents, his prohibition from seeing them or discussing them with counsel was "unfair" and prevented him from meaningfully contributing to the prosecution and defense of his case.[9] The district court's decision to seal Bamberg's motion for summary judgment and accompanying brief in support is reviewed for an abuse of discretion. *See Cusack* v. *Bank United of Texas FSB* 159 F.3d 1040, 1042 (7th Cir. 1998).

A decision to seal the record will occasionally be necessary to promote the interests of justice. *See Grove Fresh Distrib., Inc.* v. *Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994) (seal only appropriate where necessary to preserve higher values); *In re Continental Ill. Sec. Litig.*, 732 F.2d 1302, 1314 (7th Cir. 1984) (seal appropriate only in an exceptional circumstance). Within this vein, courts have long recognized the need to protect the physical and psychological well-being of child abuse victims in judicial proceedings, and a variety of measures have been used to ameliorate the harsh consequences associated with child abuse cases. *See e.g. Maryland* v. *Craig*, 497 U.S. 836, 843 (1990) (child testified over one-way closed circuit television outside the presence of the parties); *United States* v. *Carrier*, 9 F.3d 867, 869 (10th Cir. 1993) (child testified over two-way closed circuit television in the presence of the attorneys); *United States* v. *Garcia*, 7 F.3d 885, 887 (9th Cir. 1993) (child testified over two-way closed circuit television outside the presence of the defendant); *Thomas* v. *Gunter*, 962 F.2d 1477, 1480 (10th Cir. 1992) (child videotaped at treatment center in the presence of her therapist and an investigator selected by the defendant); *Spigarolo*

---

[9] We reiterate that Aylward's counsel was provided full access to the documents and, in fact, filed a detailed response to the summary judgment motion.

v. *Meachum*. 934 F.2d 19, 21 (2d Cir. 1991) (child videotaped in the presence of the attorneys and judge); *Arcaris* v. *Superior Court*, 774 P.2d 837, 839 (Ariz. Ct. App. 1989) (mother allowed to be present during child's deposition); *Otteson* v. *District Court*, 443 N.W.2d 726, 727 (Iowa Ct. App. 1989) (defendant separated from child by one-way mirror). We are of the opinion that these cases strike an appropriate balance between the need to provide a supportive environment for the child witness and the defendant's right to a fair trial. In light of the extraordinary measures courts are willing to go to protect a child's interest in criminal cases, where the stakes are much higher, we refuse to hold that the district court abused his discretion by sealing Bamberg's motion for summary judgment in a civil case.

Aylward challenges the grant of summary judgment to Bamberg on his defamation claim. He argues that the existence of certain disputed, material facts as to whether Bamberg acted maliciously or in bad faith precluded the grant of summary judgement. "We review the trial court's grant of summary judgment *de novo*, reviewing the record in the light most favorable to the non-moving party. *Aberman* v. *Abouchar & Sons. Inc.*, 160 F.3d 1148, 1150 (7th Cir. 1998) (citing *Thomas* v. *Ramos*, 130 F.3d 754, 759 (7th Cir. 1997)) (emphasis in original). The grant of "[s]ummary judgment is appropriate only 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' " *Huntzinger*, 143 F.3d at 306-07 (quoting Fed. R. Civ. P.56(c)). After reviewing the record, we are of the opinion that Aylward failed to meet his burden of rebutting Indiana's presumption of good faith when Bamberg reported her suspicions that the children may be the victims of abuse to the authorities at Fort Benning. In fact, from our review of the record, we are convinced that Bamberg had

good reason to believe that the children had recently been subjected to abuse. [10]

For example, therapy sessions with Wisley led Bamberg to opine that Wisley was subjected to mental, emotional, physical, as well as sexual abuse during her marriage. While this information does not relate directly to the condition of the children, it does suggest an atmosphere conducive to abuse.

More importantly, Bamberg began counseling the four children in early 1992. In a report dated June 2, 1992, Bamberg documented her findings regarding the children, relying on her own observations and medical reports prepared at the Wishard Hospital. As previously stated, these reports noted that each of the three oldest children exhibited genital and/or rectal abnormalities.[11]

A variety of clinical indicators also suggested a high probability of abuse. Though other possible explanations for some of these indicators existed, answers obtained from Wisely convinced Bamberg that explanations other than abuse were unlikely. Additionally, Bamberg assessed the children's behavior and attitudes through the Sex Abuse Legitimacy Schedule, a test applied to differentiate between legitimate and illegitimate claims of abuse. According to Bamberg, the test results for all four children strongly suggested abuse.

---

[10] We are aware that the record contains information which supports the proposition that the children were not actually abused. Most of this information, however, was unavailable to Bamberg and Indiana requires that Bamberg inform the authorities as soon as she has "reason to believe," not when she is absolutely certain, child abuse is occurring.

[11] Regarding Rachel and Faythe, the reports indicated that the physical findings would support allegations of sexual abuse but, in isolation, did not prove such abuse occurred. Regarding Benjamin, the reports indicated that the physical findings would neither support nor negate concerns of sexual abuse.

There was also other information which supported Bamberg's conclusion that the children were being abused. For example, Wisley gave Bamberg verbal updates about the children, a well as notes and journal entries chronicling the children's behavior. Wisley also produced audio tapes of the children's conversations with her and with each other. Bamberg reviewed all these materials before reporting the suspected abuse. Additionally, Bamberg reviewed a Monroe County (Indiana) Circuit Court Juvenile Division caseworker's reports, dated September 26, 1990, and a letter from the Charter Counseling Center, dated January 21, 1991, which contained further evidence strongly suggesting abuse.

On July 1, 1992, Bamberg prepared another report concerning the children's condition, stating that they appeared to be suffering from "increased difficulties." The report noted particular degeneration of Faythe, Rachel, and Sara, as well as an increase in Benjamin's anger; all of which Bamberg found to be clinically significant.

In mid-August, Bamberg spoke with Hartman, Wisley's divorce attorney, and indicated to Hartman that she had observed a recent deterioration in the children's behavior. Hartman, in turn, informed Bamberg that if she believed any abuse was present she (Bamberg) had a legal duty to report the information to the proper authorities. It was only after this that Bamberg called the military police at Fort Benning and reported her suspicions to Sergeant Robinson. Based upon all this information, Bamberg had more than a sufficient reason to believe the four children were victims of child abuse.

As stated previously, Indiana law provides civil immunity for an individual who reports her suspicions of child abuse or neglect unless the person "acted maliciously or in bad faith." Ind. Code § 31-33-6-2. Moreover, the statute specifically provides that good faith is to be presumed. *See id.* at § 31-33-6-3; *see also Kinder* v. *Doe*, 540 N.E.2d 111, 115 (Ind. Ct. App. 1989) ("In balancing the policies [of encouraging reports of suspected abuse versus discourag-

ing reports made maliciously or in bad faith] the (Indiana] legislature has tipped the balance in favor of encouraging reports by providing that reporters will be presumed to have acted in good faith."). Therefore, we, like the district court did, begin with the presumption that Bamberg acted in good faith when she reported her suspicions of child abuse to the military police at Fort Benning.

The only portion of the record which could be used to support Aylward's assertion that Bamberg acted in bad faith comes in the form of his own affidavit, which states:

> 18. He [Aylward) believes that the report of sexual abuse by [Bamberg] to the military authorities at Ft. Benning . . . was done with actual malice, ill-will, and in bad faith because it was done in concert with others around this time, such as the Alliance for the Rights of Children, Kitty Kruse, Leorna Rosen, Mitchelle Etlin, and others to damage his reputation with the military and to circumvent the decision of the Monroe Circuit Court with the intent to take custody of his children from him, she had no personal knowledge of the allegations she made against him, the children made no such allegations to her during her last telephone therapy session, and that she was acted [sic] as agent on behalf of her client, [Wisley], whose malice, ill-will, and bad faith were acted out through [Bamberg], whose recommendations had been rejected by the Monroe Circuit Court.

Unfortunately for Aylward, the facts described in his affidavit fail to make the necessary showing that Bamberg acted from any improper motive. Aylward never attaches any legal significance to his claims that Bamberg acted in concert with others nor did he substantiate his allegation that these individuals acted to circumvent the Monroe Circuit Court's decision regarding custody or to damage his reputation. The challenge regarding Bamberg's lack of personal knowledge also fails to imply any impropriety. Indiana law does not require personal knowledge and his affidavit does not dispute the numerous other sources Bamberg considered before reaching her conclusions. Similarly,

Aylward's claim that Bamberg acted as Wisley's agent is mere speculation.

Paragraph 18 contains nothing more than conclusory language and such language does not preclude summary judgement. *See Jackson* v. *E.J. Branch Corp.*, No. 97-3940, 1999 WL 274546, at *11 (7th Cir. May 5, 1999) ("These assertions without factual support are simply not enough to overcome [Aylward's] burden. Even though it is true, because this case comes before us on a summary judgment motion, that we will construe the facts and draw inferences in the manner most favorable to the nonmoving party, it is equally axiomatic that a plaintiffs conclusory statements do not create an issue of fact.").

Indiana law mandated that Bamberg report her suspicions to the proper authorities. It also directs that we presume she acted in good faith in making the report. Because Aylward never adequately rebutted this presumption, the decision of the district court is

AFFIRMED.

# UNITED STATES DISTRICT COURT

**SOUTHERN DISTRICT OF INDIANA**
**INDIANAPOLIS DIVISION**

---

**Cause No. IP 94-0705 M/S**

---

ROBERT W. AYLWARD, - - - - - - *Plaintiff,*

*v.*

CLAIRE W. BAMBERG, - - - - - - *Defendant.*

---

## ORDER ON DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

In the present dispute, Plaintiff Robert W. Aylward ("Aylward") has raised a defamation claim against Defendant, Claire W. Bamberg ("Bamberg"). Essentially, Aylward has alleged that Bamberg committed slander under Indiana law when she reported to the military police in Fort Benning, Georgia, that Aylward's children may have been abused. Bamberg has responded that Indiana law not only required her to make this report but also shields her with immunity for having done so. Consequently, Bamberg has filed a Motion for Partial summary Judgment on Aylward's defamation claim. for reasons sets forth fully below, this Court now GRANTS this Motion for Summary Judgment.

The standards for summary judgment have been frequently recited by this Court and are no doubt familiar to the parties. According to Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." When this standard has been met, summary judgment is mandatory. *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322-23 (1986); *Shields Enters.*,

*Inc.* v. *First Chicago Corp.*, 975 F.2d 1290, 1294 (7th Cir. 1992). The mere existence of a factual dispute, by itself, is not sufficient to bar summary judgment. Rather, the disputed facts must be outcome determinative. *Anderson* v. *Liberty Lobby. Inc.*, 477 U.S. 242, 248 (1986); *Schroeder* v. *Barth*, 969 F.2d 421, 423 (7th Cir. 1992). Only factual disputes that might affect the outcome of the suit in light of the substantive law will preclude summary judgment. *Anderson*, 477 U.S. at 248. Moreover, " 'self-serving affidavits without factual support in the record will not defeat a motion for summary judgment.' " *Darnell* v. *Target Stores*, 16 F.3d 174, 177 (7th Cir. 1994) (*quoting Slowiak* v. *Land O'Lakes. Inc.*, 987 F.2d 1293, 1295 (7th Cir. 1993)).

In the present case, the parties do not dispute certain principal facts. Bamberg is a pastoral counselor and psychotherapist employed at Mount Gilead Counseling Center. Claire Bamberg Aff. ("Bamberg Aff."), ¶ 2. In September, 1991, Bamberg first met Julie Wisley ("Wisley"), who was Aylward's former spouse, and Bamberg and Wisley entered into a counseling relationship. Bamberg Aff., ¶ 3. Beginning in February, 1992, Bamberg also provided counseling for the four children of Aylward and Wisley: Rachel, Benjamin, Faythe, and Sara. Barnberg Aff., ¶ 10, Att. A. This gave Bamberg the opportunity to talk with and to observe the children. Based upon her observations, discussions with the children and their mother, and certain clinical reports, Bamberg concluded that it was highly probable the children had been abused by someone. Bamberg Aff., ¶¶ 11-15, 16-17. Accordingly, on August 15, 1992, Bamberg telephoned the military police at Fort Benning, Georgia—where Aylward was stationed at the time—to report her suspicion of child abuse. Bamberg Aff., ¶¶ 19-21.

Aylward now contends that this telephone call to the military police constituted defamation; Bamberg counters that Indiana law required her to make the report and provides her with a cloak of immunity. Section 31-6-11-3 of the Indiana Code unambiguously states that "any individual who has reason to believe that a child is a victim of

child abuse or neglect *shall* make a report as required by this chapter." (emphasis added). *See also Devorev. State*, 658 N.E.2d 657, 658 (Ind. Ct. App. 1995) (emphasizing that everyone has a duty to report suspected child abuse); *Daymude* v. *State*, 540 N.E.2d 1263, 1265 (Ind. Ct. App. 1989) (noting that duty to report applies even when information received through the course of confidential communications). This chapter defines "reason to believe" to mean "evidence that, if presented to individuals of similar background and training, would cause those individuals to believe that a child was abused or neglected." Ind. Code § 31-6-11-2.1. Moreover, under certain circumstances, Indiana law does provide immunity to individuals who report child abuse or neglect. According to § 31-6-11-7,

> [a] person, other than a person accused of child abuse or neglect, who . . . makes or causes to be made a report of a child who may be a victim of child abuse or neglect . . . is immune from any civil or criminal liability that might otherwise be imposed because of such actions. However, immunity does not attach for any person who has acted maliciously or in bad faith. A person making a report that a child may be a victim of child abuse or neglect or assisting in any requirement of this chapter is presumed to have acted in good faith.

According to these statutes, Indiana law required Bamberg to make a report if she had "reason to believe" the children were suffering from abuse. Moreover, she is immune from civil liability for her action unless she acted "maliciously or in bad faith."

The evidence presently before this Court indicates that Bamberg had reason to believe the children may be suffering from abuse. For example, through therapy sessions with Wisley, Bamberg learned of several abusive incidents during Wisley's relationship with Aylward. Bamberg Aff., ¶¶ 6-9. Based upon descriptions of these incidents, Bamberg believes Wisley was subjected to mental, emotional, physical, and sexual abuse during her marriage to Aylward. Bamberg Aff., ¶ 9. While this information does not relate

directly to the condition of the children, it does suggest an atmosphere conducive to abuse.

More importantly, Bamberg began counseling sessions with the four Aylward children in early 1992. Bamberg Aff., ¶ 10, Att. A. In a report dated June 2, 1992, Bamberg documented her findings regarding the four children. Bamberg Aff., ¶ 10, Att. A. In reaching her conclusions, Bamberg relied upon her own observations as well as medical reports prepared at Wishard Hospital. Bamberg Aff., ¶ 10, Att. A. While the specific details of these medical reports shall not be repeated here, it is highly significant that the reports state that each of the children exhibited genital and/or rectal abnormalities. Bamberg Aff., ¶¶ 11-14, Atts. A, D. Regarding Rachel and Faythe, the Wishard reports indicate that the physical findings would support allegations of sexual abuse but, in isolation, did not prove such abuse occurred. Bamberg Aff., Att. D. Regarding Benjamin and Sara, the reports indicate that the physical findings would neither support nor negate concerns of sexual abuse. Bamberg Aff., Att. D.

Bamberg also noted that various clinical indicators indicated a high probability of abuse. Bamberg Aff., ¶¶ 11-14, Att. A. Although Bamberg also explored other possible explanations for some of these abnormalities, answers obtained from Wisley made explanations other than abuse unlikely. Bamberg Aff., ¶ 11. In addition, Bamberg assessed the children's behavior and attitudes through the Sex Abuse Legitimacy Schedule, a test applied to differentiate between legitimate and illegitimate claims of abuse. Bamberg Aff., ¶ 15, Atts. A, B. According to Bamberg's report, the test results for all four children strongly suggested sexual abuse. Bamberg Aff., ¶ 15, Atts. A, B.

Other information known by Bamberg at that time also supported her conclusion that the children may have been abused. Bamberg Aff., Att. D. For example, Wisley gave Bamberg verbal updates about the children—as well as notes and journal entries chronicling the children's behavior and audio tapes of children's conversations with her

and with each other. Bamberg Aff., ¶ 23. Bamberg also reviewed a caseworker's report dated September 26, 1990, which contained further evidence strongly suggesting abuse. Bamberg Aff., Att. D.

In late July of 1992, Bamberg prepared another report to the court concerning the children's condition. Bamberg Aff., ¶ 16, Att. C. This report, dated July 31, 1992, noted that the children appeared to suffer from increasing difficulties. Bamberg Aff., Att. C. In July and August, Bamberg noted particular degeneration of Faythe, Rachel, and Sara—as well as an increase in Benjamin's anger. Bamberg Aff., ¶ 17. Bamberg found these changes clinically significant. Bamberg Aff., ¶ 17.

On August 14, Bamberg spoke on the telephone with Marilyn Hartman, who represented Wisley in the ongoing divorce and custody proceedings between Wisley and Aylward. Bamberg Aff., ¶ 18. When Bamberg indicated to Hartman that she had observed a recent degeneration in the children's behavior, Hartman responded that Bamberg had a legal obligation to report that information to the proper authorities at Fort Benning in Georgia. Bamberg Aff., ¶ 18. The following day, Bamberg telephoned the military police at Fort Benning—whom she believed to be the proper agency to receive this report of suspicion of child abuse—and spoke to Sergeant Frederick Robinson ("Sergeant Robinson") of the United States Army. Bamberg Aff., ¶¶ 19-20. After Sergeant Robinson indicated he was the proper person to take a report of suspicion of abuse, Bamberg informed him that she had become aware of facts that led her to suspect that Aylward and Wisley's children may be suffering from abuse and that she believed the children should be examined. Bamberg Aff., ¶¶ 20, 21. Sergeant Robinson stated that he would take care of this examination. Bamberg Aff., ¶ 21.

When taken together, this evidence seems to present a strong likelihood that the Benjamin, Rachel, Faythe, and Sara may have been subjected to abuse or neglect. In fact, Bamberg had more than her own observations to support

her suspicion. She reviewed medical reports indicating certain physical abnormalities. She noted that various clinical indicators and tests suggested abuse. In addition, she believed that various forms of abuse may have been present during Wisley's marriage to Aylward. Based upon all this information, it appears plain that Bamberg had reason to believe the four children were victims of child abuse. Consequently, Indiana law placed an affirmative duty upon Bamberg to report her suspicions to the proper legal authorities.

As stated previously, Indiana law provides civil immunity for an individual who reports her suspicion of child abuse or neglect unless the person "acted maliciously or in bad faith." Ind. Code § 31-6-11-7. Moreover, the statute specifically provides that "[a] person making a report that a child may be a victim of child abuse or neglect or assisting in any requirement of this chapter is presumed to have acted in good faith." *Id.; see also Burrell* v. *Meads*, 540 N.E.2d 111, 115 (Ind. Ct. App. 1989) ("In balancing the policies [of encouraging reports of suspected abuse versus discouraging reports made maliciously or in bad faith] the legislature has tipped the balance in favor of encouraging reports by providing that reporters will be presumed to have acted in good faith."). Therefore, this Court must presume that Bamberg acted in good faith when she reported her suspicions to the military police.

Stated simply, Aylward has not presented evidence sufficient to rebut this presumption. The only evidence even remotely pertinent to this issue comes in Aylward's own affidavit, which provides as follows:

> 18. He [Aylward] believes that the report of sexual abuse by Claire W. Bamberg to the military authorities at Ft. Benning, Georgia on August 15, 1992, was done with actual malice, ill-will, and in bad faith because it was done in concert with others around this time, such as the Alliance for the Rights of Children, Kitty Kruse, Leorna Rosen, Mitchelle Etlin, and others to damage his reputation with the military and to circumvent the decision of the Monroe Circuit Court

> with the intent to take custody of his children from him, she had no personal knowledge of the allegations she made against him, the children made no such allegations to her during her last telephone therapy session, and that she was acted as agent on behalf of her client, Julie Wisley, whose malice, ill-will, and bad faith were acted out through Claire W. Bamberg, whose recommendations had been rejected by the Monroe Circuit Court.

Robert Aylward Aff., ¶ 18. The facts described by Aylward fail to suggest that Bamberg acted from any improper motive. Aylward has not ascribed any legal significance to his assertion that Bamberg acted in concert with others nor has he substantiated his allegation that these individuals acted to circumvent the Monroe Circuit Court's decision regarding custody or to damage his reputation. The challenge to Bamberg's personal knowledge does not imply any impropriety-especially given the broad range of sources Bamberg considered in reaching her conclusions. The suggestion that Bamberg acted to implement Wisley's private agenda appears to be nothing more than speculation without any factual support. This paragraph contains nothing more than conclusory allegations of malice, ill-will, and bad faith; such conclusory language in an affidavit does not preclude summary judgment.

Indiana law directs that this Court must presume Bamberg acted in good faith when she reported her suspicions to the military police in Georgia. Nothing in the present record has rebutted this presumption. Accordingly, Bamberg is entitled to statutory immunity for her action, and summary judgment on Aylward's defamation claim must be GRANTED in her favor.

IT IS SO ORDERED this 28th day of June, 1996.

/s/ Larry J. McKinney
Larry J. McKinney, Judge
United States District Court
Southern District of Indiana

Distribution To:

Alphonso Manns
Manns & Manns
Post Office Box 1914
Bloomington, IN 47402-1914

Andrew P. Wirick
Hume Smith Geddes Green & Simmons
54 Monument Circle, Suite 400
Indianapolis, IN 46204

# UNITED STATES DISTRICT COURT

**SOUTHERN DISTRICT OF INDIANA**
**INDIANAPOLIS DIVISION**

---

## Cause No. IP94-705-C-M/F

---

ROBERT W. AYLWARD, - - - - - - *Plaintiff,*

*v.*

CLAIRE W. BAMBERG, - - - - - - *Defendant.*

---

## ORDER

Comes now the Court upon the Motion of Defendant and Counter-Plaintiff, Claire W. Bamberg, to seal her Submission of Evidentiary Materials in Support of Motion for Summary Judgment and Memorandum in Support of Motion for Summary Judgment.

The Court, being duly advised, hereby finds that said motion is well taken and should be GRANTED. The Court thereby specifically orders that the tendered evidentiary materials in support of Defendant Bamberg's Motion for Summary Judgment and Memorandum in Support of Motion for Summary Judgment shall be ordered sealed and directs the Clerk of this Court to seal such documents and prohibit their dissemination to any third parties. The Court further orders that while Mr. Manns is hereby authorized to open the sealed copy of the evidentiary materials in support of Motion for Summary Judgment and Memorandum in Support of Motion for Summary Judgment that have been previously tendered to him, he shall not share same with any other person and shall specifically not share same with his client, Plaintiff, Robert W. Aylward. Mr. Manns is ordered to strictly limit his use of these materials to the presentation and/or defense of the claims raised in this case. Should either party to this case conclude that such publication into the unsealed record in this case or

third-party dissemination is necessary to preserve their rights in this lawsuit or to litigate their position, either at trial or at some point prior to trial, this Court shall consider such modification of this Order only upon written motion or consent of both parties.

IT IS SO ORDERED.

Dated: October 25, 1995

/s/ Larry J. McKinney, Judge
United States District Court
Southern District of Indiana

Distribution To:

Andrew P. Wirick
Hume Smith Geddes Green & Simmons
54 Monument Circle, Suite 400
Indianapolis, IN 46204

Alphonso Manns
Attorney at Law
Post Office Box 1914
Bloomington, IN 47402-1914